Sri Alam Sdn Bhd v Newacres Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO C189 OF 1985
NH CHAN J
20 SEPTEMBER 1995

Equity *— Fiduciary duties — Breach — Whether parties to joint venture agreement were in fiduciary relationship in the nature of partnership — Nature of relationship to determine whether fiduciary — Trustee — Fiduciary must not profit from his fiduciary position*

Civil Procedure *— Set-off — Whether defence of set off available — Plaintiff not making claim for money collected by defendants on its behalf — Rules of the High Court O 18 r 17*

The plaintiff and the defendant entered into a joint venture agreement whereby the defendant would develop the land which was owned by the plaintiff. Clause 1 of the agreement provided that the plaintiff would be allotted a certain number of plots of the said land and the defendant would retain the balance of the plots of that land subject to cll 5 and 22 thereof. Clause 15 of the agreement provided that the land would be sold to the defendant subject to the plaintiff's entitlement under cl 5(a) thereof and the land would be held on trust by the defendant for the plaintiff. Clause 5(a) of the agreement provided that the defendant should transfer certain semi-detached houses that were to be built on the said land to the plaintiff. Clause 5(b) of the agreement provided that the defendant should allot to the plaintiff certain bungalow plots. Clause 5(d) of the agreement provided that the defendant should carry out further developments or certain acts on the said land. Further, cl 22 of the agreement provided that the defendant might increase the number of housing plots on the said land but the plaintiff would be entitled to 12% of the buildings that were to be built on such increased plots.

The plaintiff alleged that the defendant owed him a fiduciary duty to act honestly and fairly in all the defendant's dealings with him pertaining to the said land and the plaintiff sued the defendant for breach of such fiduciary duty.

The High Court dismissed the plaintiff's claim against the defendant. The plaintiff appealed. The Supreme Court allowed the appeal and entered judgment for the plaintiff on liability. The case was remitted for trial before another High Court judge to determine the extent of the fiduciary duties in the matter and any breach thereof, and to assess what sum or other entitlement, if any, which the plaintiff was entitled to receive from the defendant, and to make all consequential orders. The defendant's appeal

against counterclaim was also allowed and the High Court was to determine any set off. A

Held, dismissing the plaintiff's claim:

(1) If judgment on liability had been entered in favour of the plaintiff as stated in the Supreme Court order, the Supreme Court would have already found that there had been a breach of fiduciary duty by the defendant. It would then be superfluous to ask the High Court to determine whether there was 'any breach thereof' of the fiduciary duties as provided for under the third order. In the circumstances, the second order should be disregarded. B C

(2) It was not every kind of fiduciary relationship that justified every kind of interference. The nature of the fiduciary relationship determined the extent or scope of a fiduciary's duty and the justification for the interference.

(3) There was the rule that a fiduciary was under the obligation not to profit from his position. D

(4) The classes of cases in which a fiduciary duty had been held to exist were not closed.

(5) The strength or severity of the rule that no fiduciary might profit from his position as a fiduciary was said to be an 'inflexible' rule of equity. That inflexible rule of equity depended not on fraud or absence of bona fides, but on the mere fact of a profit being made. E

(6) Here, the joint venture agreement made between the parties did not exhibit the normal attributes of a partnership. There was no 'business in common' between the plaintiff and the defendant, let alone one 'with a view of profit'. By virtue of cl 1 of the agreement, the parties were to combine their resources and to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sub-lots with or without buildings erected thereon respecting which there was to be complete freedom to deal with or dispose of as it wished. Each party intended a wholly separate business. Since there was no partnership, the defendant was not a fiduciary as a partner in a partnership would have been. F G H

(7) However, pursuant to cl 15 of the agreement, the defendant, as trustee, was in a fiduciary position to the plaintiff in respect of the plaintiff's entitlement under cl 5(a).

(8) As a fiduciary, the defendant trustee was not allowed to make a profit from the trust. I

(9) In respect of the plaintiff's claims under cll 5(a), (b), (d) and 22 of the agreement, they were contractual in nature and there was no pleading for such causes of action.

A (10) Here, the defendant's fiduciary duty towards the plaintiff extended only to the position of the defendant as a fiduciary in relation to cll 5 and 22 of the agreement.

(11) There was no evidence whatsoever that the defendant had made a profit by means of its position as trustee or by means
B of property held by it for the plaintiff. The defendant had not breached its fiduciary duty.

(12) As the plaintiff had not made a claim for the money collected on his behalf by the defendant from his purchasers in the statement of claim, the defence of set off was not available to
C the defendant here.

[Bahasa Malaysia summary

Plaintif dan defendan telah mengikat satu perjanjian usaha sama di mana defendan akan memajukan tanah kepunyaan plaintif. Fasal 1 perjanjian itu memperuntukkan bahawa plaintif akan
D diuntukkan sejumlah tertentu lot tanah itu dan defendan akan menyimpan baki lot tanah itu tertakluk kepada fasal 5 dan 22 perjanjian itu. Fasal 15 perjanjian itu memperuntukkan bahawa tanah itu akan dijual kepada defendan tertakluk kepada hak plaintif di bawah fasal 5(a) dan tanah itu akan dipegang di bawah amanah
E oleh defendan bagi plaintif. Fasal 5(a) perjanjian itu memperuntukkan bahawa defendan patut memindahmilik beberapa rumah kembar tertentu yang bakal didirikan pada tanah itu kepada plaintif. Fasal 5(b) perjanjian itu memperuntukkan bahawa defendan patut menguntukkan kepada plaintif beberapa lot tanah tertentu untuk mendirikan bungalow. Fasal 5(d) pula
F memperuntukkan bahawa defendan patut menjalankan pemajuan seterusnya atau tindakan-tindakan tertentu yang lain pada tanah itu. Seterusnya, fasal 22 memperuntukkan bahawa defendan boleh meningkatkan jumlah lot tanah untuk perumahan pada tanah itu tetapi plaintif berhak kepada 12% daripada rumah-rumah yang
G bakal dibina pada lot tanah yang ditambahkan itu.

Plaintif mendakwa bahawa defendan berada di bawah tugas fidusiari kepadanya untuk berlaku jujur dan saksama dalam semua urusan defendan dengannya bersangkutan dengan tanah itu dan ia membawa tindakan terhadap defendan untuk keingkaran tugas
H fidusiari itu.

Mahkamah Tinggi menolak tuntutan plaintif terhadap defendan. Plaintif membuat rayuan. Mahkamah Agung membenarkan rayuan itu dan memberikan penghakiman kepada plaintif berkenaan tanggungan. Kes itu kemudiannya dihantar balik untuk perbicaraan di depan hakim Mahkamah Tinggi yang
I lain untuk menentukan takat tugas fidusiari di dalam perkara ini dan sama ada terdapat keingkaran tugas itu, dan untuk mentaksirkan apakah jumlah atau hak lain, jika ada, yang berhak diterima oleh plaintif dari defendan, dan untuk membuat semua

perintah berbangkit. Rayuan defendan terhadap tuntutan balas juga dibenarkan dan Mahkamah Tinggi ditugaskan menentukan apa-apa tolakan. A

Diputuskan, menolak tuntutan plaintif:

(1) Jika penghakiman berkenaan tanggungan telah dimasukkan berpihak kepada plaintif seperti yang dinyatakan dalam perintah Mahkamah Agung, Mahkamah Agung mestilah telah mendapati bahawa terdapat keingkaran tugas fidusiari oleh defendan. Berikutan daripada itu adalah berlebihan untuk mengarahkan Mahkamah Tinggi menentukan sama ada terdapat 'apa-apa keingkaran tugas itu' seperti yang diperuntukkan di dalam perintah ketiga. Oleh itu, perintah kedua patut tidak diendahkan. B C

(2) Bukanlah setiap jenis hubungan fidusiari yang boleh menjustifikasikan percampuran tangan. Jenis hubungan fidusiari menentukan takat atau bidang tugas fidusiari itu dan justifikasi untuk percampuran tangan. D

(3) Terdapat peraturan bahawa seorang fidusiari berada di bawah obligasi supaya tidak meraih keuntungan daripada kedudukannya.

(4) Kelas-kelas kes di mana tugas fidusiari diputuskan wujud tidaklah ditutup. E

(5) Peraturan bahawa tiada fidusiari boleh meraih keuntungan daripada kedudukannya sebagai seorang fidusiari adalah satu peraturan ekuiti yang 'tidak boleh lentur'. Ia bergantung bukan kepada fraud atau ketiadaan bona fides, tetapi kepada fakta semata-mata bahawa keuntungan diperolehi. F

(6) Di sini, perjanjian usaha sama di antara pihak-pihak itu tidak menunjukkan ciri-ciri biasa satu perkongsian. Tidak terdapat 'business in common' di antara plaintif dan defendan, apatah lagi satu perniagaan 'with a view of profit'. Memandangkan fasal 1 perjanjian itu, pihak-pihak itu akan menggabungkan sumber mereka dan membahagikan hasil akhir dalam kadar yang dipersetujui, iaitu setiapnya akan mengambil, dengan mengetepikan yang lain, lot-lot tanah tertentu dengan atau tanpa bangunan dibina padanya yang boleh diuruskan atau dijual secara bebas mengikut kehendak tersendiri. Setiap pihak bertujuan menjalankan perniagaan yang berasingan. Oleh kerana tidak terdapat perkongsian, defendan bukanlah seorang fidusiari seperti mana seorang pekongsi di dalam satu perkongsian akan disifatkan. G H

(7) Walau bagaimanapun, menurut fasal 15 perjanjian itu, defendan, sebagai pemegang amanah, berada dalam kedudukan fidusiari kepada plaintif berkenaan dengan hak plaintif di bawah fasal 5(a). I

(8) Sebagai seorang fidusiari, defendan tidak dibenarkan meraih keuntungan daripada amanah itu.

(9) Berkenaan dengan tuntutan plaintif di bawah fasal 5(a), (b), (d) dan 22 perjanjian itu, mereka adalah bersifat kontrak dan tidak terdapat pliding untuk kausa tindakan sedemikian.

(10) Di sini, tugas fidusiari defendan kepada plaintif cuma berkait dengan kedudukan defendan sebagai fidusiari berkenaan dengan fasal 5 dan 22 perjanjian itu.

(11) Tidak ada keterangan sama sekali bahawa defendan telah mendapat keuntungan menerusi kedudukannya sebagai pemegang amanah atau melalui harta yang dipegang olehnya untuk plaintif. Defendan tidak mengingkari tugas fidusiarinya.

(12) Oleh kerana plaintif tidak membuat tuntutan dalam pernyataan tuntutannya untuk wang yang dipungut bagi pihaknya oleh defendan daripada pembeli, pembelaan tolakan tidak wujud bagi defendan di sini.]

Notes

For cases on fiduciary relationships and duties, see 6 *Mallal's Digest* (4th Ed) paras 1570–1572.

For cases on set off, see 2 *Mallal's Digest* (4th Ed,1994 Reissue) paras 3043–3053 and 6 *Mallal's Digest* (4th Ed) paras 600–601.

Cases referred to

Boardman v Phipps [1967] 2 AC 46; [1966] 3 WLR 1009; [1966] 3 All ER 721 (refd)

Bray v Ford [1896] AC 44 (folld)

Chooi Siew Cheong v Lucky Height Development Sdn Bhd [1995] 1 MLJ 513 (folld)

Coomber, Re; Coomber v Coomber [1911] 1 Ch 723 (folld)

Donoghue v Stevenson [1932] AC 562 (refd)

English v Dedham Vale Properties Ltd [1978] 1 WLR 93; [1978] 1 All ER 382 (folld)

Keech v Sandford (1726) Sel Cas T King 61; 25 ER 223 (folld)

Laskin v Bache & Co (1971) 23 DLR (3d) 385 (folld)

New Zealand Netherlands Society 'Oranje' Inc v Kuys (Laurentius Cornelis) [1973] 1 WLR 1126; [1973] 2 All ER 1222 (folld)

Parker v McKenna (1874) LR 10 Ch 96 (folld)

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134; [1942] 1 All ER 378 (folld)

Legislation referred to

Partnership Act 1961 ss 3, 4

Rules of the High Court 1980 O 18 r 17

Partnership Act 1961 [UK] ss 31, 32

G Sri Ram, V Manokaran, Joseph Yeo and *V Nadarajan* (*Sri Ram & Co*) for the plaintiff. A

Mohd Ismail, Jin Chong and *Oommen Koshy* (*Mohamed Ismail & Co*) for the defendant.

NH Chan J: This case was commenced by originating summons but subsequently it was continued by order of the court as a writ action with pleadings to be filed. B

On 7 December 1993, the Supreme Court had allowed (in Supreme Court Civil Appeal No 02–368–1992) an appeal by Sri Alam Sdn Bhd against the judgment of the High Court dismissing its claim against Newacres Sdn Bhd. The case was also ordered to be remitted for trial C before another judge of the High Court to determine the extent of the fiduciary duties in the case and any breach thereof, and to assess what sum of money or other entitlement, if any, which the appellant is entitled to receive from the respondent.

By a letter dated 21 December 1993, Gunn Chit Tuan CJ (Malaya) D has appointed me to try this case on a priority basis. In that letter, the former Chief Justice also enclosed the decision made by the Supreme Court which I reproduce below:

> Supreme Court Civil Appeal No 02–368 of 1992 (Mahkamah Tinggi Saman Pemula No C189/1985) E
>
> Sri Alam Sdn Bhd ... Perayu
>
> Newacres Sdn Bhd ... Penentang
>
> Coram: Gunn Chit Tuan CJ (Malaya), Mohd Azmi SCJ, Mohamad Dzaiddin SCJ F
>
> Unanimous Orders
>
> 1 Appeal of appellant is allowed.
>
> 2 Order of the trial judge in dismissing plaintiff's claim is reversed and set aside. Judgment is hereby entered for the appellant on liability.
>
> 3 Case is remitted for trial before another High Court judge to G determine the extent of the fiduciary duties in this case and any breach thereof, and to assess what sum of money or other entitlement, if any, which the appellant is entitled to receive from the respondent, and to make all consequential orders.
>
> 4 Appeal against counterclaim is also allowed and the High Court is to H determine any set-off.
>
> 5 Half costs to appellant here and below.

It is not easy to understand the order of the Supreme Court. In one breath, by order (2), it says, 'Judgment is hereby entered for the appellant on liability' which in effect is granting the declaration sought I by the plaintiff. The plaintiff had claimed for 'a declaration that the defendant has acted in breach of its fiduciary duties.' In the next breath, by order (3), the Supreme Court orders the case to be sent back

to the High Court for the trial 'to determine the extent of the fiduciary duties in this case and any breach thereof.'

If judgment had been given for the plaintiff against the defendant for breach of fiduciary duty, then, there would be no need to remit the case to the High Court to determine if there was a breach of fiduciary duty by the defendant. There could not be a judgment on liability in a fiduciary relationship case unless there had been a breach of fiduciary duty. If the breach had already been determined by the judgment on liability as stated in order (2), then, it would be superfluous to ask the High Court, as stated in order (3), to determine 'any breach thereof' of the fiduciary duties, the extent or scope of which, in any case, has yet to be determined by the court.

I think the words in order (2) that 'judgment is hereby entered for the appellant on liability' are unnecessary, otherwise, order (3) will have no meaning. They should be disregarded as they made order (2) inconsistent with order (3).

There is another way of looking at order (2). It could mean 'judgment is hereby entered for the appellant on liability' as a fiduciary, so that when we come to order (3), we can 'determine the extent of the fiduciary duties in this case and any breach thereof.' But that seems like a non sequitur because it means that the Supreme Court, despite after having found that there was liability against the defendant (which could only be so if there had been a breach of a fiduciary duty), is still asking the High Court to determine if there was a breach of a fiduciary duty all over again.

As demonstrated above, it is only where order (2) is otiose that order (3) can be proceeded with. If order (2) was to prevail over order (3), then order (3) would be superfluous because it would no longer serve any useful purpose for the High Court to determine if there was a breach of fiduciary duty.

The upshot of all this is that only order (3) prevails when the case is remitted for trial before another judge of the High Court who is to determine the extent or scope of the fiduciary duties owed by the defendant in this case and any breach of them by the defendant, and to assess the sums (if any) which may be found due to the plaintiff. Thus it has fallen on me as the judge who has been appointed by the then Chief Justice to determine these issues, and the scope of my enquiry is only confined to the terms of order (3) plus the consideration whether set-off as a defence is available to the defendant as stated in order (4).

Fletcher Moulton LJ in *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723 said, at pp 728–729:

> Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the courts have again and again, in cases

> where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.

Dr Sealy in his article (LS Sealy, 'Fiduciary Relationships' [1962] CLJ 69) says this, at p 73:

> The word 'fiduciary,' we find, is not definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like; it does not warrant the inference that any particular fiduciary principle or remedy can be applied.

It is not every kind of fiduciary relationship that justifies every kind of interference. The nature of the fiduciary relationship must be such that it justifies the interference. We must be able to recognise that a fiduciary relationship situation exists. There should not be any difficulty to be able to do so when we meet one. The extent or scope of a fiduciary's duty will depend on the nature of the fiduciary relationship. The justification for the interference will then depend on the nature of the fiduciary relationship.

In *New Zealand Netherlands Society v Kuys* [1973] 1 WLR 1126; [1973] 2 All ER 1222, Lord Wilberforce, giving the judgment of the Privy Council (Lord Wilberforce, Lord Hodson, Lord Pearson, Lord Diplock and Lord Simon of Glaisdale) said ([1973] 2 All ER 1222 at p 1225):

> Their Lordships are in agreement with these contentions insofar as they stress the necessity to give consideration to the nature of the relationship between Kuys and the society and to the question whether that relationship imposed on him, in relation to the particular transaction under investigation, duties of a fiduciary character. The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords (*Boardman v Phipps* [1967] 2 AC 46; [1966] 3 WLR 1009; [1966] 3 All ER 721). It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Boardman v Phipps* [1966] 3 All ER 721 at p 756; [1967] 2 AC at p 123:
>
> > 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms

A and applied with particular attention to the exact circumstances of each case.'

The principle or rule, ie the obligation of a fiduciary not to profit from his position, was enunciated in 1726 in the case of *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223 and was originally restricted to B trustees. The rule has been applied since to agents, as, for example, solicitors and directors of limited companies, to partners and to master and servant relationships, but the precise scope of it must be moulded according to the nature of the relationship. For examples of other persons to whom the principle applies, see *Snell's Equity* (29th Ed, 1990), at p 253:

C

> Similar restrictions on the making of profits have been imposed on servants (*Reading v A-G* [1951] AC 507), guardians (*Hatch v Hatch* (1804) 9 Ves 292), partners (*Aas v Benham* [1891] 2 Ch 244; *Thompson's Trustee in Bankruptcy v Heaton* [1974] 1 WLR 605; *Chan (Kak Loui) v Zacharia* (1984) 154 CLR 178), promotors of companies (*Erlanger v New* D *Sombrero Phosphate Co* (1878) 3 App Cas 1218; *Gluckstein v Barnes* [1900] AC 240; *Jubilee Cotton Mills Ltd v Lewis* [1924] AC 958), managing owners of ships (*Williamson v Hine* [1891] 1 Ch 390), receivers (*Nugent v Nugent* [1908] 1 Ch 546), managers of young artistes (*O' Sullivan v Management Agency and Music Ltd* [1985] QB 428), borough treasurers (*A-G v De Winton* [1906] 2 Ch 106), and members of a committee of E inspection in bankruptcy (*Re Bulmer* [1937] Ch 499). Indeed, there is authority for saying that in this context there is a fiduciary relationship 'whenever the plaintiff entrusts to the defendant a job to be performed' (*Reading v R* [1949] 2 KB 232 at p 236, per Asquith LJ; affirmed [1951] AC 507), so that a servant of the Crown who accepts bribes for misusing his position is accountable to the Crown for the bribes (*Reading v A-G* F [1951] AC 507). Similarly, a prospective purchaser who, unbeknown to the prospective vendor, applies for planning permission in the latter's name is accountable for the profits accruing from the permission. He is a self-appointed agent whose acts can be ratified and adopted (*English v Dedham Vale Properties Ltd* [1978] 1 WLR 93).

Just as 'the categories of negligence are never closed' (*Donoghue v* G *Stevenson* [1932] AC 562), similarly, Arnup J said in *Laskin v Bache & Co* (1971) 23 DLR (3d) 385 at p 392:

> In my opinion the category of cases in which fiduciary obligations and duties arise from the circumstances of the case and the relationship of the parties is no more closed than the categories of negligence at common H law.

See *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93; [1978] 1 All ER 382 at p 398, where Slade J said:

> I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited I number of strait-jackets or as being necessarily closed. They are, after all, no more than formulae for equitable relief.

See also *Chooi Siew Cheong v Lucky Height Development Sdn Bhd* [1995] 1 MLJ 513 at p 522 where Chong Siew Fai FCJ (as he then was), giving the judgment of the Federal Court (Eusoff Chin CJ, Mohamed Azmi and Chong Siew Fai FCJJ) said this;

> the classes of cases in which a fiduciary duty has been held to exist are not closed.

The strength, and indeed the severity, of the rule that no fiduciary may profit from his position as a fiduciary is said to be an 'inflexible' rule of equity. This often quoted phrase is from the judgment of James LJ in *Parker v McKenna* (1874) LR 10 Ch 96 at pp 124–125 (where the judge after laying down the principle that 'no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal' said that):

> that rule is an inflexible rule, and must be applied inexorably by this court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

This was repeated by Lord Herschell in *Bray v Ford* [1896] AC 44 at pp 51–52:

> It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore been deemed expedient to lay down this positive rule.

This inflexible rule of equity depends not on fraud or absence of bona fides, but on the mere fact of a profit made. See *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; [1942] 1 All ER 378. Viscount Sankey said, at [1967] 2 AC 134, 137; [1942] 1 All ER 378, 381:

> In my view, the respondents were in a fiduciary position and their liability to account does not depend upon proof of mala fides. The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust. The earlier cases are concerned with trusts of specific property: *Keech v Sandford* (1726) Sel Cas T King 61, per Lord King LC. The rule, however, applies to agents, as, for example, solicitors and directors, when acting in a fiduciary capacity.

Per Lord Russell of Killowen [1967] 2 AC 134, 144; [1942] 1 All ER 378, 386:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

The implications of equity's rule are far-reaching as the case of *Boardman v Phipps* [1967] 2 AC 46; [1966] 3 WLR 1009; [1966] 3 All ER 721 has shown. See GH Jones (1968) 84 LQR 472 at p 474 where the learned writer says this:

> The implications of equity's rule are far-reaching. Once a fiduciary is shown to be in breach of his duty of loyalty he must disgorge any benefit gained even though he acted honestly and in his principal's best interests, even though his principal benefited as well as he from his conduct, even though his principal could not otherwise have obtained the benefit, and even though the benefit was obtained through the use of the fiduciary's own assets and in consequence of his personal skill and judgment.

Before embarking on my inquiry as directed by the Supreme Court under order (3), it is necessary to consider the nature of the relationship between the plaintiff and the defendant and to the question whether that relationship imposed on the defendant, in relation to the particular transaction under investigation, duties of a fiduciary character. This is necessary because, as has already been seen, it is not every kind of fiduciary relationship that justifies every kind of interference or, as was put by Fletcher Moulton LJ: 'The nature of the fiduciary relation must be such that it justifies the interference.'

Paragraph 13 of the statement of claim reads:

> (a) By reason of the joint-venture agreement and by reason of all the circumstances of the case, the defendant is and was at all material times under a fiduciary or legal duty to act honestly and fairly *in all its dealings with the plaintiff pertaining to the said land.* [The emphasis is mine.]
>
> (b) The defendant has at all material times acted in breach of its aforesaid duty.

In the case of a partnership, a partner is a fiduciary towards his co-partners in all partnership dealings and transactions. By para 13 of the statement of claim the plaintiff is alleging a fiduciary relationship that is akin to that of a partnership.

In *Lindley and Banks on Partnership* (16th Ed, 1990) it says, at pp 412–413, para 16-08:

it was established by numerous decisions prior to the Partnership Act 1890, that one partner was not at liberty to make a profit at the expense of his co-partners without their full knowledge and consent, whether that profit was made directly or indirectly, eg by appropriating some benefit to himself which he ought to have acquired, if at all, on behalf of all the partners. The obligation established by those decisions was placed on a statutory footing in the Partnership Act 1890:

> '29(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connexion.
>
> (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
>
> 30 If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.'

Although all questions of accountability must now be determined by reference to the above sections, the pre-1890 cases still afford a valuable illustration of the principles on which the sections were based and will frequently indicate the way in which they are likely to be applied by the courts.

See also ss 31 and 32 in our Partnership Act 1961 which are similar to the English provisions. The two sections are as follows:

> 31(1) Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection.
>
> (2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.
>
> 32 If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

In the present case, the agreement has been described by the parties as a joint-venture agreement. The question is, is the defendant a fiduciary as a partner in a partnership is a fiduciary towards his co-partners in all partnership dealings and transactions? The answer will depend on whether the agreement, by whatever name it is called, has all the normal attributes of a partnership.

Before I start to scrutinise the parties' arrangements in the contract, I must first say a few words on what are the normal attributes of a partnership. *Lindley and Banks on Partnership* (16th Ed, 1990) says, at p 59, para 5-01:

> The ultimate test of the existence of a partnership is by reference to the statutory definition set out in s 1 of the Partnership Act 1890, as illuminated by the rules set out in s 2. Although the earlier cases, on which those sections were based, may be of relevance, they cannot take precedence over the provisions of the Act itself.

In this country, the statutory definition is set out in s 3 of the Malaysian Partnership Act 1961, as illuminated by the rules set out in s 4 which are in pari materia to the UK provisions.

Section 3(1) of our Partnership Act 1961 reads:

> Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

And s 4 provides as follows:

> In determining whether a partnership does or does not exist, regard shall be had to the following rules:
>
> (a) joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;
>
> (b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;
>
> (c) the receipt by a person of a share of the profits of business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contigent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular —
>
> (i) the receipt by a person of a debt or other liquidated amount, by instalments or otherwise, out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;
>
> (ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;
>
> (iii) a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not, by reason only of such receipt, a partner in the business or liable as such;
>
> (iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person

that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits, arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such:

Provided that the contract is in writing and signed by or on behalf of all the parties thereto; and

(v) a person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not, by reason only of such receipt, a partner in the business or liable as such.

In *Chooi Siew Cheong v Lucky Height Development*, Chong Siew Fai FCJ said this, at p 521:

> The term 'partnership' is defined as the relation which subsists between persons carrying on a business in common with a view of profit (s 3(1) of the Act). In deciding whether or not a partnership exists, the court, apart from giving regard to the relevant rules in s 4 of the Act, must consider the intentions of the parties as appearing from the whole facts of the case and the contract they had made.
>
> The opening sentence of rule (c) of s 4 of the Act provides: 'the receipt by a person of a share of the profits of business is prima facie evidence that he is a partner in the business.' The term 'prima facie evidence' means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention, ie that the person is a partner in the business. (See 17 *Halsbury's Laws of England* (4th Ed) at para 28.)

Lindley and Banks on Partnership (16th Ed, 1990), at pp 60, 61 para 5–03, puts it thus:

> if, on a consideration of all the surrounding circumstances, a contract exhibits all the normal attributes of a partnership save that the parties are called something other than partners, eg joint venturers, they will almost inevitably be held to be in partnership.

And para 5–04, at p 61 says:

> Conversely, it cannot automatically be assumed that the participants in a joint venture do not each intend to carry on their own separate businesses. Such a situation is by no means unknown, eg share farming and oil exploration ventures. In such cases, it is necessary to scrutinise the parties' arrangements in order to ascertain their true intentions.

I shall now scrutinise the parties' arrangements in the agreement. It is described on the cover of the agreement as 'Joint Venture Agreement'. But nowhere in the text of the agreement is the term 'joint venture' mentioned. The agreement was dated 2 October 1980 between Sri Alam Sdn Bhd (the plaintiff) which is referred to as 'the company' of the one part and Newacres Sdn Bhd (the defendant) which is referred to as 'the developer' of the other part.

The company (the plaintiff) was at the relevant time the registered proprietor of the land mentioned in the agreement (first recital). The third and last recital says this:

A And whereas the company has offered to the developer and the developer has accepted the offer to develop the said land into the said housing development as aforesaid upon the terms and conditions hereinafter contained.

The thrust of the contract is set out in cl 1 of the agreement which is as B follows:

1 In consideration of the developer paying to the company upon execution of this agreement a sum of dollars Five Hundred Thousand (RM500,000) only (the receipt whereof the company hereby acknowledges) being deposit and part of the advance referred to in cl 2 hereof and subject to the respective agreements undertakings and C obligations of the parties as herein set out the company hereby allows the developer to develop the whole of the said land and to design construct and complete for the company the said buildings including access roads drainage and other housing amenities in accordance with the said building plans, specifications and layout plan or as amended but subject to the approvals of or amendments D made thereon by the appropriate authorities and subject further to the terms and conditions hereinafter contained. Upon the condition that the developer shall retain free from all encumbrances in accordance with and subject to the provisions of the cll 5 and 22 hereof the balance of the plots to be sub-divided from the said land remaining after the allocation to the company the number of the said E lots in accordance with cll 5 and 22 hereof.

Put shortly, clause 1 means this:

(1) The defendant is to pay to the plaintiff an advance of $7,500,000 to the plaintiff in accordance with cll 1 and 2.

F (2) The defendant is 'to develop the whole of the daid land and to design construct and complete for the company the said buildings including access roads drainage and other housing amenities in accordance with the said building plans, specifications and layout plan or as amended but subject to the approvals of or amendments made thereon by the appropriate authorities' on the terms and G conditions thereinafter contained in the agreement.

(3) The plaintiff will be allotted the number of plots set out in cll 5 and 22.

(4) The defendant will retain 'the balance of the plots' to be sub-divided from the land.

H

The above clearly shows that this is a straightforward commercial transaction between a housing or property developer and the proprietor of land. For developing the land (which is described in the recital as 'the land held under CT No 19542 for lot 82 mukim and daerah of Klang comprising in area approximately 584 acres 3 roods 0 poles'), I that is, by putting up the buildings (together with their attendant infrastructure and amenities) for the plaintiff/proprietor, the defendant/developer is to have the balance of the remaining plots after allotting to the plaintiff the number of plots of the various types set out in cl 5 of

the agreement plus any entitlement to receive further plots if the conditions stated in cl 22 are satisfied.

The situation in the present case is almost on all fours with the situation in the Federal Court case of *Chooi Siew Cheong v Lucky Height Development*. See the judgment of Chong Siew Fai FCJ, at pp 521, 522 where he said:

> In the instant case under appeal, the plaintiff (through his father who was a party to the initial agreement) provided the land and the first defendant company was to provide capital, labour and services to develop and build on the land. With their combined resources they were to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sub-lots with or without buildings erected thereon respecting which there was to be complete freedom to deal with or dispose of as he or it wished. In other words, each intended a wholly separate business; there was no 'business in common', ie a single business by the parties nor, it follows, 'with a view of profit' from such business. In our view, therefore, no partnership resulted from the agreement.
>
> At the hearing of the appeal, *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 was cited. That case, however, is no authority for the proposition that joint venturers in all joint venture agreements are partners within the [Partnership] Act. It dealt with the question of fiduciary relation.

And a little later (at p 522) the judge went on to say:

> While joint venturers in an undertaking may owe certain fiduciary duties to one another, the existence of such duties does not necessarily make them partners under the Act.

After scrutinising the agreement, I find that the contract, even though it is described as a joint venture agreement by the parties, does not exhibit the normal attributes of a partnership. Many of the rights and duties normally associated with partnership, such as, an obligation to contribute capital and to share losses and profits and a right to participate fully in the management of the firm (unless one is a sleeping partner) are not exhibited in the so called joint venturers' arrangement in the contract. Section 3(1) of the Partnership Act says that: 'Partnership is the relation which subsists between persons carrying on business in common with a view of profit.' In the instant case, there is no 'business in common' between the plaintiff and the defendant. In fact, each is carrying on a wholly separate business, so that there is no 'business in common,' let alone one 'with a view of profit.' The plaintiff provides the land and the defendant the financial means to develop and build on the land. To borrow the words of Chong Siew Fai FCJ (*Chooi Siew Cheong v Lucky Height Development* at p 521): 'With their combined resources they were to share the ultimate product in agreed proportions in that each was to take, to the exclusion of the other, certain sublots with or without buildings erected thereon respecting which there was to be complete freedom to deal with or dispose of as he or it wished. In other words, each intended a wholly separate business; there was no

A "business in common', ie a single business by the parties nor, it follows, "with a view of profit" from such business.' In my judgment, there is no partnership and the defendant is not a fiduciary as a partner in a partnership is a fiduciary towards his co-partners.

The next clause which has to be scrutinised is cl 15. The clause
B reads:

> At any time after the execution of this agreement and simultaneously with the payment pursuant to cl 2 (a) hereof and the execution of the guarantee under cl 9 hereof, the developer may by notice in writing to the company require the company to transfer the said land to the developer subject always to the company's entitlement under cl 5(a) hereof and the
C properties described thereof being held by the developer on trust for the company. Immediately upon such transfer being effected, the said land shall be deemed to have been sold to the developer subject nevertheless to the terms hereof and the developer shall be entitled to deal with the said land as beneficial owners thereof. Both parties shall comply with the provisions of the Real Property Gains Tax Act 1976 (if applicable) and in
D particular shall submit all requisite returns to the Director General of Inland Revenue Malaysia and it is hereinbefore expressly agreed that the company shall be liable for and indemnify the developer against liabilities, the Real Property Gains Tax (if any) chargeable against the company arising out of the sale of the said land.

E The clause means this. When the land was subsequently transferred to the defendant under cl 15, it was 'deemed to have been sold to the developer' (the defendant) under the terms of the agreement. The sale was subject to the plaintiff's entitlement under cl 5(a) and the properties described therein are to be held on trust by the defendant for the plaintiff.

F Therefore, as trustee the defendant is in a fiduciary position to the plaintiff in respect of the plaintiff's entitlement under cl 5(a).

As a fiduciary, the trustee (the defendant) is not allowed to make a profit from the trust. This passage in *Snell's Equity* (29th Ed, 1990), at p 245, has conveniently summarized what I have said earlier in this
G judgment on the obligation or duty of a trustee fiduciary not to profit from his position:

> With certain exceptions, neither directly nor indirectly may a trustee make a profit from his trust. ... he may not put himself in a position where his duty and his interest may conflict, or where he may be able to
H take advantage of knowledge of the property (eg as to valuable minerals under the land) which he acquired while trustee.
>
> The rule depends not on fraud or mala fides, but on the mere fact of a profit made. It applies to all types of trustee, including custodian trustees, and to other persons in fiduciary positions.

I After having said that the defendant is (in relation to cl 5(a)) a trustee and as such trustee is a fiduciary to the plaintiff, I now come to consider cl 5(a) which reads as follows:

The company shall be allocated the following plots completely developed together with all the necessary infrastructure and amenities by the developer constructing at its sole cost and expenses the relev[a]nt residential, commercial or other buildings on such said plots:

	Types of plots	No of plots
1	Low cost houses	1,105
2	Single storey terrace houses	399
3	Low cost flats	264
4	Petrol kiosks	2
5	Shop houses	79
6	Double-storey terrace houses	198
7	Semi-detached houses	56

It is common ground that the plaintiff's entitlement to the allocations of the units for items 1 to 6 have been delivered and there is no dispute about them in the present action.

As for item 7, ie 56 units of semi-detached houses, the defendant has omitted them in the 1983 amended layout plan. But Encik Mohamed Ismail (for the defendant) says that the layout plan has been amended since to provide for 60 units of semi-detached houses and that they are undergoing construction at the present time and that the 56 units would be delivered to the plaintiff when completed.

The result of this is that only item 7 of the plaintiff's entitlement in cl 5(a) has not been delivered. In the event of late or non delivery of the outstanding 56 units of semi-detached houses, the plaintiff's remedy lies in contract (probably on a claim for damages for breach of contract for late or non delivery, or for specific performance). Although the plaintiff is contractually entitled to the 56 units of semi-detached houses, there is no pleading for such a cause of action. Also the cause of action had not accrued at the time when the proceeding was filed in 1985. At that time, delivery was not due yet. The period for performance by the defendant under the contract which was dated in 1980 was eight years (which could be extended under cl 21 and which in fact was extended to 1990). But had the defendant made use of its position as trustee to make a profit out of the trust property, equity would require the defendant as a fiduciary to disgorge its profits or other advantage to the plaintiff. The question is, was there in fact a profit made by the defendant from its trust out of the remaining units which have not been delivered yet? I find that there is not a shred of evidence to show that such was the case. I am satisfied, therefore, that the defendant did not breach its duty as a fiduciary.

In the case of cl 5(a), the defendant is a trustee and as such trustee is a fiduciary to the plaintiff, and the duty of a fiduciary who is holding property in trust not to profit from his trust applies to the defendant as such trustee. This duty also applies to other persons in fiduciary positions even though they are not trustees. For a summary on the duty of other

persons in fiduciary positions (as has already been addressed in this judgment), see *Snell's Equity*, ante, at p 251, where it says:

> Principles similar to these are applicable to all other persons who, even though they are not trustees holding property in trust, nevertheless occupy a fiduciary position. All these persons must refund with interest all profits which they have made by means of their position or by means of property held by them, unless they made the profits with the full knowledge and approval of the persons to whom they owe a duty.

So that for the other remaining provisions of cl 5, there are those in which the defendant occupies a fiduciary position even though the defendant is not a trustee holding property in trust.

I shall now consider those remaining provisions in cl 5 where the defendant occupies a fiduciary position. I shall start with cl 5(b) which reads:

> The company shall be allocated all the bungalow plots as approved in the layout plan as presently approved with all necessary infrastructure and amenities to be constructed at the sole cost and expense of the developer but without any buildings.

Mr Manoharan (for the plaintiff) says that there were 149 bungalow plots in the original layout plan but the defendant had only allotted to the plaintiff 142 bungalow plots. The defendant says that the shortage of seven bungalow plots was caused by planning requirements and Lembaga Letrik Negara adjustments so that it was not possible to fit 149 bungalow plots in the given area as shown in the original plan. If the defendant was in breach of cl 5(b) by not providing the full entitlement of 149 bungalow plots to the plaintiff, but instead only provided for 142 plots, the remedy (to recover the outstanding entitlement of seven bungalow plots) for the plaintiff lies in contract. But there is no pleading for a cause of action founded on contract to claim the plaintiff's entitlement for the outstanding seven bungalow plots. In any case this cause of action had not accrued when the proceeding was commenced in 1985. But had the defendant (which occupied a fiduciary position) made profits by means of its position or by means of the property held by it, then equity would require the defendant as a fiduciary to disgorge with interest all profits which it had made. There is not a jot of evidence which points to the fact that profit was made by the defendant by means of its position or by means of this property.

Therefore, I find that there was no breach of the defendant's fiduciary duty with regard to cl 5(b).

The next clause which I need to consider is cl 5(d) which reads:

> The company shall also be entitled and be allocated the following:
>
> (i) thirty-five percent (35%) of the cinema unit to be built by the developer at its own costs and expenses;

(ii) thirty-five percent (35%) of any extra shop-lots and thirty-three percent (33%) of any extra residential plots fully developed by the developer at its own cost and expense together with all necessary infrastructure and amenities, such extra plots being available on the basis of the layout plan as presently approved after survey.

(iii) all portions of the said land required for public use or purpose.

On cl 5(d)(i), to date the cinema has not been built yet so that any claim by the plaintiff to his entitlement under this sub-clause, for example, for specific performance of this term, lies in contract. But there is no pleading for such a cause of action. In any case the cause of action had not accrued when the action was filed in 1985.

As for cl 5(d)(ii), the question as to how this term is to be interpreted is contractual in nature. Clause 5(a) states the actual number of units to be allotted to the plaintiff by the defendant. On the other hand, cl 5(d)(ii) speaks of the percentage of the plots to be allotted to the plaintiff. What cl 5(d)(ii) means is this. If after a survey was done based on the original layout plan and applying the percentages as stated in the subclause (35% for shop lots and 33% for residential plots) it was found that the number of units for each category exceeds the number of those which is stated in cl 5(a) as the plaintiff's entitlement, then such extra units shall be allocated to the plaintiff. But a survey based on the original layout plan was never done. It appears that a survey is now no longer possible as subsequent events have overtaken the position as envisaged by this subclause. Without a survey being done, we would not know if there would be any extra units to which the plaintiff would be entitled under the cl (5(d)(ii)). Who should have done the survey? Clause 5(d)(ii) is silent as to that, which means that either the plaintiff or the defendant could have done the survey. Encik Mohamed Ismail says that since there was no survey done (and the plaintiff's entitlement to extra units, if any, under cl 5(d)(ii) could only be ascertained after survey), therefore, only cl 5(a) remains and it prevails. As I have said earlier, the question is one of construction of these two terms in the contract. If, as a matter of construction, the plaintiff was entitled to have the survey done by the defendant under cl 5(d)(ii), then the plaintiff should have sued the defendant to compel it to have the survey done. But that should have been done before events have overtaken it. In my view, since the survey was not done and it is now too late to have it done, cl 5(d)(ii) has become superfluous and can no longer be applicable. Therefore, only the plaintiff's entitlement under cl 5(a) remains and it prevails.

Clause 5(d)(iii) says that the plaintiff is entitled to all portions of the land required for public use of purpose. If the plaintiff was entitled to them under the terms of the contract, then it should have sued for them. But there is no pleading for such a contractual claim in the statement of claim. Encik Mohamed Ismail says that this term is repugnant and should be disregarded as superfluous as land required for public use or purpose has to be surrendered to the state authority. But Mr Manoharan says that what he is asking for are those portions of

A the land which have been saved from being taken over by the state authority as public utility land. Whichever view is correct is a matter of construction of this particular term in the contract. But there is no pleading for a claim under cl 5(d)(iii) by the plaintiff.

I now come to cl 22, the relevant parts of which read:

B

> It is hereby agreed between the parties hereto that the developer shall be entitled at its sole costs and expenses to amend the approved layout plan to increase the number of housing plots to be subdivided from the said land provided always that:-
>
> (a) such said amendments shall not affect the area of each of the plots to
C be allocated to the company under cl 3 [this is a typographical error, it should read as 5] hereof and as far as possible not to [a]ffect the relative positions of the same;
>
> (b) the company shall be allocated twelve percent (12%) of each type of the building (including corner plots) to be erected by the developer on such increased plots;

D

This clause allows the developer (the defendant) to amend the approved layout plan so as to increase the number of housing plots on the land, in which event, the plaintiff is entitled to 12% of the buildings (including corner plots) to be built on the increased plots. The development on the land is still going on. Any claim by the plaintiff for its 12% entitlement
E under this clause is contractual in nature. There is no pleading for it in the present case.

In my judgment, I am of the view that in respect of the terms in cll 5 and 22, the claims that could have been made against the defendant are contractual in nature. Since there are no pleadings for those claims,
F I need not have to express any opinion on them. In any case, they are outside the scope of my inquiry as ordered by the Supreme Court by order (3). Therefore, confining myself to order (3), I am satisfied that there is no evidence whatsoever that the defendant had made a profit by means of its position or by means of property held by it for the plaintiff. I find that the defendant had not breached its fiduciary duty. As
G fiduciary, the defendant has to disgorge all profits which it had made by means of its position or by means of property held by it. There is not a tittle of evidence that profits have been made by the defendant by such means.

The duty of a fiduciary not to profit from his position as a fiduciary
H is an inflexible rule of equity and it depends not on fraud or absence of bona fides, but on the mere fact of a profit made.

Once a fiduciary is shown to be in breach of his duty of loyalty (that is to say, his obligation not to profit from his position as a fiduciary) he must disgorge any benefit gained even though he acted
I honestly and in his principal's best interests.

The extent of a fiduciary's duty will depend on the nature of the relationship. In the case of a partnership, the fiduciary duty of a partner towards his co-partners extends to all partnership dealings and transactions.

In the instant case, the extent of the defendant's fiduciary duty towards the plaintiff extends only to the position of the defendant as a fiduciary in relation to cll 5 and 22 of the contract.

And finally I come to order (4) where this court (High Court) has been asked to make a determination on the issue of set off.

Clause 4 of the contract reads:

> The company hereby expressly agrees that the advance shall be repaid by allowing to the developer to retain out of or set off against the purchase prices of the buildings to be built on the sub-divided plots and allocated to the company in accordance with cll 5 and 22 hereof such purchase price to be paid by the respective purchasers to the developer for account of the company.

The clause allows the developer (the defendant) to set off the advance of RM7.5m (which the defendant had made to the plaintiff under cll (1) and (2) of the contract) against the purchase price collected from the plaintiff's purchasers by the defendant on behalf of the plaintiff.

Encik Mohamed Ismail says that, in addition to the retention of the advance of RM7.5m, the defendant is also entitled to retain out of the money collected from the plaintiff's purchasers money due to the defendant by the plaintiff under cll 6(a) and 12(i).

Order 18 r 17 reads:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim.

The defence of set off is available in answer to the whole or part of a claim made by the plaintiff. As the plaintiff had not made a claim for the money collected on its behalf by the defendant from the plaintiff's purchasers in his statement of claim, this defence is therefore not available to the defendant in the present case.

For the reasons which I have stated above, I dismiss the plaintiff's claim with costs to the defendant.

Claim dismissed.

Reported by Gary Kwan